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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
09 AT SEATTLE

10 MICHAEL DUANE BENJAMIN,)
11)
12 Petitioner,) CASE NO. C05-1630TSZ-JPD
13)
14)
15 v.)
16)
17 B.G. COMPTON,) REPORT AND RECOMMENDATION
18)
19 Respondent.)
20)

21 Petitioner is a federal prisoner who is currently incarcerated at the Federal Correctional
22 Institution at Lompoc, California. He has submitted to this Court for review a petition for writ
23 of habeas corpus under 28 U.S.C. § 2241 in which he seeks to challenge his 2003 Skagit
24 County Superior Court conviction. Petitioner asserts in his petition that the plea agreement he
25 entered into in his Skagit County case was breached. Specifically, petitioner contends that the
26 agreement called for a 22 month sentence which would run concurrently with any other state
or federal sentence. However, because petitioner was never extradited to any other
jurisdiction following his sentencing, he is now serving his federal court sentence consecutively
rather than concurrently.

27 Subject matter jurisdiction under the federal habeas statutes is limited to persons who
28 are “in custody” at the time the petition is filed. *See* 28 U.S.C. §§ 2241(c), 2254(a), § 2255.
29 Once a petitioner’s sentence has fully expired, he is precluded from challenging that sentence

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01 because he is no longer “in custody” for purposes of federal habeas review. *Maleng v. Cook*,
02 490 U.S. 488, 492 (1989).

03 While it is not clear from the petition when petitioner’s Skagit County Superior Court
04 sentence expired, the facts alleged by petitioner suggest that the sentence has, in fact,
05 expired.¹ Thus, petitioner is no longer in custody under his 2003 Skagit County conviction.
06 However, this conclusion does not necessarily end our inquiry.

07 When a habeas petitioner is in custody as a result of a subsequent conviction, and an
08 expired conviction has been used to enhance the petitioner’s current sentence, the petitioner is
09 “in custody” with respect to the subsequent conviction for purposes of federal habeas review.
10 See *Maleng*, 490 U.S. at 93; *Allen v. Oregon*, 153 F.3d 1046, 1048 (9th Cir. 1998); *Feldman*
11 v. *Perrill*, 902 F.2d 1445, 1448 (9th Cir. 1990). Petitioner does not specifically assert that his
12 current federal court sentence was enhanced by his Skagit County sentence, he appears only
13 to allege that he was required to serve more of his state court sentence than was anticipated by
14 the plea agreement and the state sentencing court. Because nothing in the record before this
15 Court indicates that petitioner’s current sentence was enhanced by his Skagit County
16 conviction, petitioner does not meet the “in custody” requirement for purposes of federal
17 habeas review of his Skagit County conviction.

18 Even assuming petitioner’s instant petition could reasonably be construed as presenting
19 a challenge to his current federal court sentence as enhanced by his state court sentence,
20 petitioner would be required to present that challenge to the federal district court which
21 imposed his current sentence. See 28 U.S.C. § 2255. It appears from a previous habeas
22 petition filed by petitioner that his current sentence was imposed by the United States District
23 Court for the District of Idaho. See C04-2123MJP.

24 _____
25 ¹ Petitioner asserts that he was sentenced in his Skagit County Superior Court case on
26 April 17, 2003. Petitioner’s 22 month sentence would therefore likely have expired, at the
latest, in early 2005.

For the foregoing reasons, petitioner's federal habeas petition should be dismissed without prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 29th day of November, 2005.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge